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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 51.

ANN E. J. CRUIT, APPELLANT,

vs.

KATE DEAN OWEN ET AL.

BRIEF FOR APPELLANT.

EDWARD H. THOMAS,
For Appellant.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Statement of the Case.

The appeal of Ann E. J. Cruit, who is a single woman about 72 years of age, in this case is from a decree of the Court of Appeals of the District of Columbia passed on the 2d day of May, 1905 (Record, page 61), which affirmed a decree of the Supreme Court of the District of Columbia (Record, pages 48, 49, 50, and 51). The construction will of Robert Cruit, who died in November, 1861 (see bill, Record, page 2), and an accounting thereunder by the appellant, are the subjects involved.

This will was executed on the 1st day of September, 1858 (see copy of will, Rec., pp. 2 and 3), and was admitted to probate in December, 1861 (see answer of appellant, Record, top of page 13). When the will was made the testator's wife, Catherine Cruit, and his four daughters, Catherine E. Owen, wife of Samuel Owen, and his single daughters, Susan, Ann (the appellant),

and Louisa were living. The appellees are the children of the testator's married daughter, Catherine, who was twice married, first to Evan Evans, and the issue of that marriage was Evanina F. Mackall, born May 22, 1848. After the death of her first husband, Evan Evans, the testator's daughter married Samuel Owen, and the appellees, Kate Dean Owen, born May 1, 1855, and Jessie Owen Cugle, born November 1, 1865, are the children of the latter marriage.

The appellees, Evanina F. Mackall and Kate Dean Owen, were both living when the will was made, and they and their mother, Catherine E. Owen, and the testator's wife and his three single daughters, Susan, Ann (the appellant), and Louisa survived him, and none of the daughters, Catherine excepted, ever married. The testator's wife, Catherine Cruit, survived him, dying in her eightieth year, on the 13th day of May, 1876 (Rec., p. 6, amended bill). Louisa Cruit died on the 2d day of January, 1876; Susan Cruit died the 31st day of December, 1900, and Catherine E. Owen died the 14th day of May, 1901 (see amended bill, Record, page 4).

The testator makes no mention by name in his will of his grandchildren, the appellees Mackall and Owen, although they were then living, but he does refer therein by name to his "dear wife Catherine," and to his " dear daughters, Catherine E., the wife of Samuel Owen, Ann Cruit, Louisa Cruit, and herself, the said Susan Cruit." It will also be noted that in this will the testator by name mentions his son-in-law, Samuel Owen, and that he provides that his real and personal estate shall, after the death of his wife (without consideration now of the other provisions of the will) belong to his daughters, for their own sole and separate use, free from the control etc., of their husbands.

No replication was filed to the answer of the appellants nor to the answers of any of other parties to the cause.

The cause proceeded to decree on "the amended bill of complaint and the answers thereto of all of the defendants and the testimony taken in the cause" (Rec., bottom of page 48):

> "It is admitted that the actual value of the real estate embraced in this cause is above the sum of $100,000" (Rec., bottom of p. 24).

The bill alleges (Rec., top of p. 5) that the "property is now under rental and produces an income of between $11,000 and $12,000 annually." The answer says (Rec., p. 13) that the gross income thereof for the year 1903 was $10,989, but says:

> "When the said Robert Cruit died the gross income of the same did not amount to $3,000 annually, but by the care, attention given, and the improvements made thereon by this defendant and her deceased sister, Susan T. Cruit, the rentals have increased as aforesaid."

The answer further says (Rec., middle of p. 18):

> "That respondent's mother and sisters, excepting the said Catherine E. Owen lived together after the death of said Robert Cruit, until by death your respondent has been and now is left alone, and ever after her father's death, until her death, which occurred on the 31st day of December, 1900, the said Susan Cruit and respondent lived in harmony and devoted their energies to preserving their deceased father's estate, expending out of their share of the income thereof the necessary moneys to erect new buildings and improve the old ones thereon, resulting in increasing the annual income of the estate from one of modest size to its present proportions."

The real estate involved is located in the city of Washington and in the State of Virginia. The city real estate is situated on the north side of F street northwest, be-

tween Fourteenth and Fifteenth streets, nearly of the whole of the frontage on the west side of Fourteenth street northwest, between F and G streets, and considerable frontage on the south side of G street northwest, between Fourteenth and Fifteenth streets. These holdings are separated only by the Wyatt Building, which is located at the northwest corner of Fourteenth and F streets northwest. Paragraph 3 of the amended bill (Record, page 2) contains a description thereof, and this description is admitted in the answer of the appellant (Record, top of page 13).

The real estate situated in the State of Virgina, is thus described in paragraph 5 of the bill:

> "Property in the State of Virginia, in the county of Alexandria, being a farm, consisting of about two hundred acres, improved by farmhouses and outbuildings, which is not at present under any specified or agreed rental, but which farm and farmhouses and outbuildings the said Ann E. J. Cruit (appellant) took, or assumed possession of, after the death of her sister, Catherine E. Owen, one of the daughters of the said Robert Cruit, deceased, who died on the 14th day of May, 1901" (Record, page 4).

The answer of the appellant in reply states:

> "The said farm in the State of Virginia comprises about two hundred and six (206) acres improved, less five or six acres taken off for roads, subject to annual taxes of $384.58, and other expenses, amounting to about $650.
>
> "This defendant further answering says that by agreement made after the death of Susan T. Cruit, on behalf of the said Catherine E. Owen in her lifetime, and the said complainants, Kate Dean Owen and Jessie Owen Cugle, and the defendant, Evanina F. Mackall, with this defendant, this defendant was to remain in sole charge and custody of said farm, accounting to her sister Catherine

E. Owen for the produce thereof, as was formerly done in the lifetime of said Susan T. Cruit.

"This defendant and the said Catherine E. Owen, accordingly, during her lifetime, divided the net produce left between them, and since the death of said Catherine this defendant continued the same practice with the complainant, Kate Dean Owen, until some time ago she refused to receive the same; but this defendant has never excluded any of them, said complainants and said defendant Evanina F. Mackall from said farm, and the same has never been a source of profit to this defendant, nor has any demand been made upon her to rent or let the farm" (Record, page 13).

The amended bill also alleges (Record, page 5):

"6. That notwithstanding the fact that the said plaintiffs, Kate Dean Owen and Jessie Owen Cugle, and the defendant, Evanina F. Mackall, are now entitled, as above set forth, to one-half of the net income derived from the above-mentioned property, and also entitled to the equitable fee-simple title of the above-described real estate, as above set forth, yet the said defendant, Ann E. J. Cruit, has collected and received and is collecting and receiving all of the rents and revenues derived therefrom since the death of the said Catherine E. Owen, and claims that she is entitled, notwithstanding the provisions of the said will of the said Robert Cruit, deceased, to all of said income from said property."

The answer of the appellant thereto states (Record, page 14):

"6. Answering the 6th paragraph of said amended bill this defendant says that so soon as she was advised that the complainants claimed that under proper construction of the said will of Robert Cruit, her father, they and the defendant, Evanina F. Mackall, were entitled to one-half of the net income of said property, this defendant segregated

one-half thereof and has kept the same to await the judicial interpretation of said will and always has, since said property has been in her charge, kept the same insured and in good order, repair, paid the taxes and faithfully and diligently collected the rents thereof and by her conduct of the said estate, has conserved and benefitted it. This defendant further says that since the death of the said Catherine E. Owen, the taxes on said real estate have been increased and that she has required an increase of rents to meet the same from tenants, which most of them have paid. This defendant does not claim, notwithstanding the provisions of said will of the said Robert Cruit, she is entitled to all of said net income from said property, but she does claim the same during her lifetime under and by virtue of said will, and she denies every conclusion of law to the contrary asserted in said amended bill."

The only matter respecting an accounting which is taken away from the claim of the appellant to the whole rental during her life by agreement of the parties, and which is made the subject of any adverse construction to her claim of what is the true meaning of this will is set forth in paragraph 7 of the amended bill, as follows (Record, page 5):

"7. The plaintiffs further state, that recently, to wit: on the 20th day of February, 1903, an agreement was entered into between the said defendants Ann E. J. Cruit, under the name and style of Emily A. J. Cruit, and Evanina F. Mackall, under the name and style of Nina F. Mackall, and the plaintiffs, Kate Dean Owen and Jessie Owen Cugle, with Benjamin S. Minor as attorney for the defendant, The American National Bank, then organizing, by which it was agreed to lease to the said, The American National Bank, defendant herein, a portion of the above-described property, to wit: premises known as No. 610 14th street, N. W., for the term of eight years, at

the yearly rental of eighteen hundred dollars ($1,800.00), payable in monthly instalments of $150.00 per month. One-half of said monthly rental to be paid over to the said defendant, Ann E. J. Cruit, under the name and style of Emily A. J. Cruit, and the other one-half of said yearly rental to be deposited each month in the American National Bank as a special deposit, the same to bear interest at the rate of four per cent (4%) per annum, and to be held by the said The American National Bank as a special deposit as aforesaid, until the termination of the litigation which is to be instituted by the filing of this bill in equity for the construction of the last will and testament of the said Robert Cruit, deceased, and the determination of the rights of the parties to this suit as to the disposition of said one-half of said yearly income, all of which will more fully appear by copies of said written agreement, in two parts, signed and accepted by the parties to this suit, and marked 'Exhibit R. C., No. 1,' and filed along with the original bill in equity and prayed to be read as and made a part of this amended bill."

Exhibit R. C., No. 1, is not a part of the record, but it is believed its provisions are substantially as above stated. It was because of this agreement that the American National Bank was made defendant in this cause. The allegations of the amended bill respecting this matter are in substance admitted in the answer of appellant (Record, page 14).

The 8th paragraph of the amended bill avers (Record, page 9):

> "That after the death of the said Robert Cruit, the said Susan T. Cruit, mentioned in his last will and testament as Susan Cruit, entered upon her active duties as trustee and continued to so act as such trustee up to and until her death, which occurred on the 31st day of December, A. D. 1900. In the execution of these trusts, she collected the rents and income derived from the various

tenants of said real estate; . . . and after paying such taxes, repairs, and insurance, paid over to the several beneficiaries under said last will and testament, the net income derived from said real estate; that is to say, to the said wife and widow, Catherine, of the said Robert Cruit, deceased, during her life, and up to and until the death of said wife and widow, Catherine . . .

"That from and after the death of the said wife and widow, Catherine, the said Susan T. Cruit, as trustee, continued to collect the said income from said real estate, and after paying therefrom the said taxes, repairs and insurance, she, the said Susan T. Cruit, trustee, paid the net income to the several daughters then living of the said Robert Cruit, deceased, equally, share and share alike, to wit: one-third of said net income to the said Catherine E. Owen, one-third thereof to the said Ann E. J. Cruit, defendant, and one-third thereof to herself, the said Susan T. Cruit. That after the death of the said Susan T. Cruit, trustee, to wit: on the 17th day of January, 1901 (during the lifetime of Catherine E. Owen), the said defendant, Ann E. J. Cruit, filed her bill in equity in this honorable court and numbered on the equity docket in the clerk's office, 21,996, against the said Catherine E. Owen (now deceased), Evanina F. Mackall, defendant herein, Kate Dean Owen, defendant herein, and Jessie Owen Cugle, defendant herein, praying for the appointment of a trustee or trustees, to act in the management of said real estate in place of said Susan T. Cruit, trustee, deceased, and on the same day (January 17, 1901) a decree was passed by this honorable court in said last mentioned cause, settling the accounts of the said Susan T. Cruit, deceased, as trustee, and appointing the said Ann E. J. Cruit, defendant herein, and Chapin Brown, as joint trustees to manage said real estate." . . .

Exhibit R. C., No. 2, is copy of this decree (Record pages 9 and 10). This decree provides:

That during the joint lives only of Ann E. J. Cruit

and Catherine E. Owen, said Ann and Chapin Brown are made trustees under this will. It continues:

> "And it is further adjudged, ordered and decreed that the estate of the trustee Susan Cruit to the time of her death be, and the same is, hereby absolved from any accounting to the said trustees and any of the parties interested herein, excepting only as to the sum of fifteen hundred and ninety-six and 83-100 ($1596.83) dollars now on deposit in her name in the National Metropolitan bank, which said sum the said trustees are hereby authorized to collect from the personal representative of the estate of said Susan Cruit and when collected shall apply the same towards the payment of the taxes accruing on the real estate of the said Robert Cruit, deceased.
>
> "And the said trustees are hereby authorized and directed to collect the income of their said trust estate as near as may be monthly and after setting aside monthly the then proportionate share and amount necessary to meet the current taxes against said estate, the current monthly proportionate share of insurance, repairs, and incidental expenses, all to be paid in due course; shall each month distribute and pay the remainder in equal shares to the complainant and the defendant Catherine E. Owen during the existence of this trust; but the complainant shall at her pleasure during her natural life remain in the sole undisturbed possession of premises No. 1409, F street, N. W., in the city of Washington, District of Columbia, where she now resides, paying for the use and occupation thereof from the death of the said Susan Cruit at the rate of thirty seven 50/100 ($37.50) dollars monthly to the trustees hereby appointed for the sole use of the defendant, Catherine E. Owen, so long as said Catherine lives and said occupation of said complainant continues; the said $37.50 being at the rate of $75.00 per month, the rental value thereof, the other one-half share belonging to complainant."

The appellant answered (Record, pages 14 and 15):

"8. This defendant admits that after the death of said Robert Cruit, the said Susan T. Cruit, entered upon her duties as trustee, but she denies that said Susan T. Cruit continued so to act up to and until her death. Whether said Susan T. Cruit continued to receive and disburse the income of said estate as trustee under said will after the death of their mother Catherine Cruit, is, this defendant is advised, a question of law, which is incorrectly set forth and asserted in said amended bill so this defendant is advised. There was no contract or agreement with or without consideration by which said Susan T. Cruit as trustee under said will collected and disbursed said income after the death of their mother Catherine Cruit. On the contrary this respondent says that the duties of said Susan T. Cruit were those of agent for her sisters when they became possessed of their right to the income of said estate. This defendant is also advised that however the parties may have regarded the said Susan T. Cruit after the death of said Catherine Cruit, that such action on their part is of no importance and of no legal effect upon the proper construction of said will and she therefore excepts and objects to said paragraph as though she had formally demurred thereto."

. . . . . .

"The plaintiffs then threatened to institute proceedings for a receiver and to take away every control of this defendant over said property and finally as a compromise without consideration of the construction of the said will respecting events to happen beyond the lifetime of said Cahtherine E. Owen, it was agreed that this defendant file said bill, and inasmuch as it was unjustly claimed and represented by complainants that her sister, Susan T. Cruit, was indebted to said Catherine E. Owen and had not properly accounted for said income and that it was necessary that the same should be settled, while in fact the said Catherine E. Owen owed to defendant one-half of the sum

of $930, which she had overdrawn from said income, the said bill was drawn and filed after mutual consultation of counsel for both parties, and said decree by agreement was passed to avoid litigation and an application for a receiver.

"Said decree accordingly, because of the said agreement of the parties, and the desire of this defendant to avoid litigation provided that the estate of said Susan T. Cruit be absolved from any accounting to the parties interested excepting as to the sum of $1,596.83 then on deposit in bank in her name, and which had been so placed by her for the purpose of paying taxes, and which sum was received and the same was applied to said taxes. The said decree, as part of said agreement, also provided (and is now in full force respecting the same as against the devisees under the will of Robert Cruit) that this defendant shall at her pleasure, during her natural life remain in the sole undisturbed possession of premises No. 1409 F street N. W. in the city of Washington, where she now resides, paying for the use and occupation there from the death of the said Susan T. Cruit, at the rate of $37.50 monthly. The said bill was not intended as a bill for the construction of said will nor was the question of its construction or the merits of this cause, now raised, considered by the parties or passed upon by the court."

The bill included prayers for an account by the appellant of rents received by her since the death of Catherine E. Owen, and that one-half of the same and one-half of the rental value of the farm since the said death be turned over to Kate Dean Owen, Jessie Owen Cugle, and Evanina F. Mackall, for construction of the will as claimed by complainants, and for appointment of trustees under the will. The answer claimed that as to the estate of the appellant it was discharged of every trust and denied the right of the co-tenants to require her to account for the rents which she has received while dis-

claiming any intent to deprive them of what might be due them (Record, page 21).

Except testimony denying that part of the answer of the appellant which states that her former co-trustee notified tenants not to pay rent to her after the death of her sister Catherine E. Owen (Record, page 26), it is believed that there is no evidence contrary to the matters of fact set forth in the appellant's answer. This contradiction is unimportant, because the disputed fact is unimportant.

There are admissions of fact (Record, pages 24, 25 and 26) in harmony with the undisputed matters of fact contained in the bill.

It is, therefore, believed that a review of the testimony which is not contrary to the answer is unnecessary. The decree (Record, pages 48, 49, 50, and 51) construed the will in accordance with the contention of the complainants and declared plaintiffs, Kate Dean Owen and Jessie Owen Cugle, and the defendant Evanina F. Mackall, entitled to one-half of the net rents of said real estate from the 14th day of May, 1901, and that the other one-half of the rents from said date remained to the appellant.

The decree proceeded:

> "And it is further adjudged, ordered and decreed: That the equitable title in remainder of all of the real estate devised by said last will and testament is now vested in the plaintiffs, Kate Dean Owen and Jessie Owen Cugle, and the defendant, Evanina F. Mackall, as remaindermen, and their respective heirs; subject to have the said title opened to let in any after born child or children, if any, of the defendant, Ann E. J. Cruit and subject also to the right of said Ann E. J. Cruit, to receive during her life one-half of the net rents, revenues and income derived from said real estate as hereinbefore decreed, under the provision of said last will and testament."

Trustees were appointed under the will and they were—

> "authorized and directed to let and lease and manage or convey, under the direction of this court, any and all of said real estate devised by said last will and testament of said Robert Cruit, deceased, and mentioned in the amended bill of complaint, and also to collect, receive and receipt for all of the rents, revenues and income arising from and out of said real estate and after setting aside monthly as near as possible the then proportionate share and amount necessary to meet the current taxes against all of said real estate, the current monthly proportionate share of insurance, repairs and incidental expenses, all of which shall be paid in due course, shall each month distribute and pay the net amount remaining, in equal shares as follows: One-half of said net amount to the said defendant, Ann E. J. Cruit, during her life only; and the other one-half thereof to the said plaintiffs, Kate Dean Owen, and her heirs or assigns, and Jessie Owen Cugle, and her heirs or assigns, and the defendant, Evanina F. Mackall, and her heirs or assigns, that is to say: One-third thereof to each; and after the death of the said Ann E. J. Cruit, then to pay all of said rents, revenues and income to the said remaindermen, Kate Dean Owen, Jesse Owen Cugle and Evanina F. Mackall, or their respective heirs or assigns, until conveyance of said real estate by said trustees to said remaindermen, under the direction and order of this court."

It was further provided:

> "That the said defendant, Ann E. J. Cruit, forthwith account to the said trustees for one-half of all the rents, revenues, and income heretofore collected and received by her from said real estate devised by the said last will and testament of the said Robert Cruit, deceased, since, from and after the death of the said Catherine E. Owen, to wit: from the fourteenth (14th) day of May, nineteen

hundred and one (1901); and she is hereby restrained and enjoined from further collecting and receiving the said rents, revenues, and income."

And, also—

"That the said defendant, American National Bank, pay to the said trustees hereby appointed, the money now on deposit with it, and all accumulated interest thereon, arising from the premises known as No. 610, Fourteenth street, N. W., the said amount when received by the said trustees to be forthwith paid to the said plaintiffs, Kate Dean Owen and Jessie Owen Cugle, and the defendant, Evanina F. Mackall, in equal shares, that is to say: one-third thereof to each, less proper charges, allowances, commissions, and expenses."

And further:

"This decree now passed shall not affect the decree heretofore passed by this court in equity cause No. 21,996, in which Ann E. J. Cruit is complainant and Catherine E. Owen and others are defendants, a copy of which last-mentioned decree is attached to the amended bill of complaint as Exhibit R. C., No. 2, including that part of said decree which provides that the said Ann E. J. Cruit 'shall, at her pleasure during her natural life, remain in the sole undisturbed possession of premises No. 1409 F street N. W., in the city of Washington, District of Columbia, where she now resides, paying for the use and occupation thereof from the death of the said Susan Cruit at the rate of thirty-seven 50-100 ($37.50) dollars monthly to the trustees hereby appointed for the sole use of the defendant, Catherine E. Owen, so long as said Catherine lives and said occupation of said complainant continues, the said $37.50 being at the rate of $75.00 per month, the rental value thereof, the other one-half share belonging to complainant,' the said Ann E. J. Cruit. The costs of this suit to be paid by the defendant, Ann E. J. Cruit."

Assignment of Errors.

I.

The court below erred by its decree that under the provisions of the will of Robert Cruit the said Kate Dean Owen, Jessie Owen Cugle, and Evanina F. Mackall were and are from the death of Catherine E. Owen entitled to receive one-half of the net rents, revenues, and income arising from and out of the real estate, devised by said last will and testament, and in not decreeing that the appellant was entitled to the whole of said rents, revenues, and income.

II.

The court below erred in not construing said will so that from and after the death of her sister, Catherine E. Owen, the appellant became entitled to receive no more than one-half of the said net rents, revenues, and income.

III.

The court below erred in its decree by placing the share and estate of the appellant in said real estate in the hands of trustees as in said decree provided and in its injunction against the appellant as in said decree contained.

IV.

The court below erred in requiring the appellant in this cause to account for and pay one-half of the rents which she may have collected since the death of Catherine E. Owen, prior to the appointment of said trustees, to them or to any person, and in distributing said rents as provided in said decree.

ARGUMENT.

First and Second Assignment of Error.

There are no circumstances shown to exist *aluinde* the will which will materially aid in its construction. It was executed in 1858, and was probably drawn by Wm. Redin, a well-known lawyer of ability, who is a witness to it.

It is phrased in techenical language aptly used without plain explanation that the words used are intended to be taken in any other than their true legal sense.

These terms deal with a passive trust; they speak with appropriate legal phrase of "sole and *separate* benefit, free from the control of the husband," etc., of an equitable separate estate of a married woman, and they express survivorship benefits for his daughters. The words "respective," "share and share alike," and others indicate a technical grasp on judicial decisions defining and applying those terms under like circumstances to those surrounding the testator as indicated in his will. The testator, therefore, had an intention which is to be ascertained by construing his will in harmony with the meaning of the technical words whereby he has manifested it.

> " When, however, a particular expression in a will has received a definite meaning, by express adjudication, such definite meaning must be adhered to, for the sake of uniformity of decision, and of security in the disposal of landed property," per Patterson, J., in Lambert *vs.* Paine, 3 Cranch 134.
>
> "When a testator uses technical words, or words which have received a settled legal sense, courts are bound to say *prima facie*, that he understood the meaning of them, and others are not to be substituted unless by express words, or from the context; or by unavoidable and necessary con-

struction it plainly appears that it was intended that the words should be construed or used otherwise, or unless it becomes necessary to do so in order to make sense of the will." Kean's Lessee *vs.* Hoffecker, 29 Am. Dec., 342.

Testator gave certain estate to his sisters P and M "for the term of their natural lives," and provided that "after the decease of both of my said sisters," a part should go to relatives and residue to an orphan asylum.

Held, survivor took the use of the whole estate, and not of a half only.

Glover *vs.* Stilson, 56 Conn., 316.

A testatrix in her will gave to a trustee named, "income to be paid equally to my brother and my sister during their natural lives, and at their death, the principal I give, to my nephews and nieces then surviving."

The brother died after the testatrix and left the sister surviving. Held, that the whole income of the property was payable thereafter to the sister until her death, until which time the gift over in remainder to the nephews and nieces was not to take effect."

Somig *vs.* Coolidge, 99 Mass. 191.

The will gave premises to three daughters and to their heirs of their bodies, RESPECTIVELY, AS TENANTS IN COMMON.

Wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants is common, cross-remainders shall be implied between them in the meantime in order to effectuate that intent.

Georges *vs.* Webb, 1 Taunton, 234.

The testator gave the residue of his real and personal estate to trustees, in trust to sell and apply the interest,

proceeds, and profits thereof from time to time, to the use of his grandchildren, Francis Armstrong, Charlotte Armstrong, Rebecca Armstrong, and Mary Armstrong EQUALLY BETWEEN THEM, SHARE AND SHARE ALIKE, for and during THEIR SEVERAL AND RESPECTIVE NATURAL LIVES; and from and immediately after the decease of the survivor of them, in trust to pay and apply the *principal* money, TO AND AMONG all and every the children of his said granddaughters, equally to be divided between them, share and share alike.

Two of the granddaughters were now dead, leaving children. The question was what should become of the interest which the two deceased granddaughters took, until the death of the survivor. The children of the deceased grandchildren claim them, their mothers being the tenants in common, therefore, there being no survivorship. But Lord Chancellor (Thurlow) said, that though the words "equally to be divided" and "share and share alike" were, in general, construed in a will, to create a tenancy in common; yet, where the contract shows a joint tenancy to be intended the words, shall be construed accordingly; and, that, in this case, it was evident that the interest was to be divided among four, while four were alive; among three, while three were alive; and nothing was to go the children, while any one of their mothers was living; and declared the whole interest to belong to the two living granddaughters, by survivorship.

Armstrong *vs.* Eldridge, 3 Bro. C. C. 215; 29 Eng. Repts. 497.

Testator gave TO THE CHILDREN of Mr. John Glass, deceased, and the children of Mrs. Lyon, deceased, the interest of £1,500 for life TO BE EQUALLY DIVIDED BETWEEN THEM, and at THEIR *decease* the same to

be divided between the grandchildren of each Mr. Glass and Mrs. Lyon. John Glass died in the lifetime of the testator leaving no children but leaving at the decease of the testator five grandchildren, Mrs. Lyon died in the lifetime of testator leaving three children. Held, that children of Mrs. Lyon shall take the whole interest NOTHING PASSING TO THE GRANDCHILDREN UNTIL THE DEATH OF ALL.

Malcolm *vs.* Martin, 3 Bro. C. C., 50; 29 Eng. Rep., 402.

W. L. devised as follows:

"I hereby desire my executor to invest all my estate that may be left so that the interest shall be paid to my daughters, Sarah J. Lazier and Louisa R. Lazier, during their lifetime, or as long as they remain single, and at THEIR DEATH or marriage, I hereby desire that amount shall be equally divided among all my children. Held, that said estate was not distributable so long as EITHER Sarah J. Lazier or Louisa R. Lazier were in life and remained single, and that, said Louisa R. having died unmarried, said Sarah J. was entitled to the interest on assets as long as she lived and remained single."

Lazier *vs.* Lazier, 35 W. Va. 567.

Where a testator in his will devises certain land to his two daughters for their natural lives, and after their death to THEIR lawful children forever, if they shall have any; and further provides that if both said daughters die childless, then the land shall go to the testator's grandson, his heirs, and assigns forever; Held, that the daughters take as tenants in common for life, with cross-remainder for life necessarily implied between them.

Smith *vs.* Usher, 108 Ga. 231.

The meaning of the testator is plain that his *daughters* shall take the whole income, including the last surviving daughter, irrespective of any technical language.

The will provides for survivorship for life in the clause:

> "And from and after their death in trust for the child or children of each of my said daughters then living in fee simple, such child or children respectively to take the share to which his, her, or their parent was entitled. And if any of my said daughters shall die without having been married, her share shall pass to her or their surviving sisters or sister for life equally; and upon her or their death the same shall vest in her or their child or children in the same manner and for the same estate and pass on her or their death as her or their original shares or share."

No share could "pass" if it did not exist, hence there must be survivorship.

Now, if there were a tenancy in common the share of the unmarried daughters would not have survived. To create survivorship a joint tenancy is required, and, therefore, the testator designed such a tenancy.

Third and Fourth Assignments of Error.

The rule is that the extent of the trustee's title depends more on the requirement of the trust than on the terms of its grant.

Poor *vs.* Considine, 6 Wall., 458.

Young *vs.* Bradley, 101 U. S., 782, 787.

The first trust declared is that in favor of the testator's wife (Record, page 3):

> "to permit *her* to receive and take the whole income thereof after paying taxes, repairs and insurance, and to apply and dispose of such net income, as *she my said wife may think proper.*"

This is purely a passive trust, for the trustee is given no duty to perform whatever.

In Poor *vs.* Considine (supra), this court said:

> "1. The trustees were to permit John M. Barr to enjoy the premises and receive the rents, issues and profits during his life.
>
> If John M. Barr should die leaving issue, and his wife Maria should survive him, then they were to permit her, during her life, to enjoy the possession and profits of the property."

A drier trust could not have been created. The duties of the trustees were wholly passive. They were authorized to do no act.

Indeed it would seem that no chancery trust ever existed as to the widow of the testator; that her life estate was untrammelled by any control of the trustees; and that at most the trustee held a dry legal title.

Reference is made to this trust simply to show that no active duties were primarily imposed on the trustee and that no argument can properly be made that such active duties continued after the death of the testator's widow. No trust exists as to the parties to this cause.

Where the testatrix devised an estate to a trustee to hold for her single daughters and pay the income during their lives, free from the debts of any husband they may have or take, etc., the trust for their separate use fell, there being no coverture when the will took effect.

Yarnall's Appeal, 70 Pa., 335.

An active trust for coverture, there being no *immediate* marriage contemplated can not take effect because there is no object to accomplish for the benefit of the *cestui que trust*.

Ogden's Appeal, 70 Pa., 501.
Williams' Appeals, 83 Pa., 390.

"If the gift be made for her sale and separate use, without more, she has, during coverture, an alienable estate independent of her husband. If the gift be made for her sale and separate use, without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate, independent of her husband. In either of these cases she has when discovert a power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence, only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended and has no operation, though it is capable of arising upon the happening of a marriage."

Tullett *vs.* Armstrong, 1 Beav., 32, 33.

Alvey, J., said in Cooney *vs.* Woodburn, 33 Md., 326:

"The separate estate, the mere creature of a court of equity, is allowed for the benefit and protection of the wife against the improvidence and misfortunes of the husband, and consequently it has its existence and operation *only during the period of coverture;* and whilst the legatee in this case remained discovert the separate estate was dormant and without effect, though it was capable of arising and did arise upon the happening of the marriage contemplated by the will; and upon the termination of the coverture by the death of the wife, such separate estate became absolutely void."

Cited Tullett *vs.* Armstrong, 1 Beav., 1, same case on appeal, 4 Myl. & Cr., 397.

Schouler Domestic Relations, secs. 107–127.

Therefore, that part of the decree which requires the appellant to account to the *trustees* appointed by the court for one-half of the rents and profits received after the death of Catherine E. Owen is erroneous for the reason that there was no trust in existence. If the

appellant is accountable at all she is solely accountable to the appellees.

If the appellant is accountable either to the trustees or the appellees, then he is not accountable for the farm income. Her answer is not in issue, and it states that the net produce was divided until one of the appellees (the only one residing in this District) refused to receive the same; that the appellees have never been excluded from the farm, and no demand has been made on appellant to rent it.

That the answer must be taken as true:

Gettings *vs.* Burch, 9 Cranch, 372.
Leeds *vs.* Marine Ins. Co., 2 Wheat., 380.
Banks *vs.* Manchester, 128 U. S., 244.
Bohrer *vs.* Otterback, 2 App. D. C., 78.
Brick Co. *vs.* Trott, 16 App. D. C., 293.
Wagenhurst *vs.* Wineland, 20 App. D. C., 85.

Besides if the appellant who has not excluded the appellees, and who is not then bailiff, nor under any agreement to account to them, nor their trustee, has received an excess of her share of the rents she is not liable to account therefor to the appellees, even if the bill be not multifarious.

A tenant in common in possession under the mistaken idea that he is entitled to the whole interest is not liable to account for the use thereof, where there is no exclusion or claim made upon him to protect the other's rights.

Sailer *vs.* Sailer, 41 N. J. Eq., 398.

The decree of the Court of Appeals should be reversed.

Respectfully submitted,

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For Appellant.